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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 376

PETER B. OLNEY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 376

PETER B. OLNEY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Peter B. Olney prays that a Writ of Certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on July 15, 1952.

Opinion Below

The special findings of fact, conclusions of law and opinion of the Court of Claims (R. 14-32) are reported in 105 F. Supp. 1005.

Jurisdiction

The judgment of the Court of Claims was entered on July 15, 1952 (R. 33). The jurisdiction of this Court is invoked under the provisions of Section 1255 of the Judicial Code.

Questions Presented

1. Whether a statute amending the Civil Service Retirement Act may, consistently with the Fifth Amendment to the Constitution, be applied to reduce the annuity of a retired federal employee.

2. Whether Congress had earlier effected the same amendment to the Civil Service Retirement Act by changing the method of compensation for Referees in Bankruptcy from a fee to a salary basis.

Statutes Involved

The rights petitioner seeks to enforce derive from Sections 5 and 6 of the Act of June 28, 1946 (60 Stat. 328, 11 USC 67, 68) and from Sections 1, 3(a), 4, 5, 9, 10, 13 and 17 of the Civil Service Retirement Act of May 29, 1930, as amended to January 1, 1949, the date of petitioner's retirement (5 USC 691, 693(a), 698, 707, 736b, 719 and 722, 716-718, 718a, 725). The amendatory act which petitioner challenges is the Act of October 5, 1949 (63 Stat. 704). These statutory provisions are set out in the Appendix, *infra*, pp. 19-32.

Statement

The facts were stipulated, and as specially found by the Court below may be summarized as follows:

Petitioner served as a Referee in Bankruptcy of the United States from 1922 to the close of 1948, when he retired voluntarily at the age of 67, after more than 29 years of Federal employment (R. 14-15). In October, 1948, he gave notice of his intention to retire and made application for retirement effective January 1, 1949, under the provisions of the Civil Service Retirement Act (R. 16-20). The Civil Service Commission adjudicated his claim to title to annuity and issued in March, 1949, a Certificate of Retire-

ment establishing for petitioner title to an annuity for life in the amount of $8,340 per annum, beginning January 1, 1949 (R. 17-18). Petitioner's highest average five-year earnings for the purposes of computing the annuity to which he had established title was $24,989.64 (R. 18-19). Petitioner was paid in accordance with the award from January, 1949, through May 31, 1950 (R. 19).

Prior to the Act of June 28, 1946, Referees in Bankruptcy were not deemed "employees" within the meaning of the Retirement Act because they were compensated on a fee basis. See Exec. Order 9154, 7 Fed. Reg. 3275; 14 Comp. Gen. 791. They were first included within the provisions of the Civil Service Retirement Act by Section 6 of that Act. From then until the effective date of petitioner's retirement, deductions were regularly made from his salary for the retirement fund. In addition, an adjustment was made in the amount of his annuity on account of amounts which would have been, but were not, deducted from his earnings prior to July 1, 1947 (R. 19).

The Act of June 28, 1946, also changed the method of compensating referees from a fee to a salary basis, the precise amount for each referee to be determined by the Judicial Conference, but not to exceed $10,000 per annum for full-time referees, or $5,000 per annum for part-time referees (11 USC, Sec. 68(a)). The Act further provided that upon retirement, referees must refrain from engaging in private practice in the field of bankruptcy (*id.*, Sec. 67(b)), and that, if able and willing, they would be subject to call for temporary service as referees without compensation (*id.*, Sec. 68(d)(2)). Aside from these special provisions of the Bankruptcy Act, the Retirement Act applies in the same way to referees as to other Federal employees. See Appendix, *infra*, p. 19.

Petitioner has refrained from private practice in the

field of bankruptcy since his retirement (R. 20). Moreover, shortly after his retirement in January 1949, he was called at his own request for service as referee in the District of Connecticut and continued to serve in that capacity by order of District Judges Hincks and Smith as the needs of the Court have required (R. 20).

On October 5, 1949, Congress amended Section 4(c) of the Civil Service Retirement Act by adding a proviso limiting to $10,000 the maximum annual earnings which could be used in computing, for purposes of determining an annuity, the highest average five-year compensation of officers paid on a fee basis. See Appendix, *infra*, p. 32. Section 2 of that Act specifically made it retroactive to April 1, 1948, which was, of course, prior to petitioner's retirement. Indeed, the amendment was expressly intended to render the reduction applicable to petitioner, who was the only retired referee whom it would affect whose claim to annuity had been adjudicated, and to two other referees whose retirement claims were pending at that time (R. 19-20).

In June 1950 petitioner received notice from the Retirement Division of the Civil Service Commission that the amount of his annuity had been recomputed and reduced to $2928 per annum by reason of the Act of October 5, 1949, and demand was made that petitioner refund all amounts in excess of this rate which he had received from the date of retirement (R. 20-21). Petitioner appealed to the Civil Service Commission from the action of the Retirement Division, requesting (a) that the Commission exercise its discretion to waive its claim for refund of the sum demanded and (b) partially in the alternative, that the Commission act to avoid an unconstitutional result by holding that the Act of October 5, 1949, did not apply to him or require recomputation of the amount of his

annuity (R. 21-22). The Commission granted petitioner's first request, but declined to reverse the action of the Retirement Division in reducing his annuity (R. 22-23). Accordingly, petitioner has been paid annuity at the rate of $2928 since June 1, 1950 (R. 14). The present action is for the difference between an annuity computed at the rate of $2928 per year and one computed at $8340 per year, since June 1, 1950 (R. 14, 23).

In the court below, the majority opinion (concurred in by three judges) did not reach the question whether the Act of October 5 might constitutionally be applied to reduce petitioner's annuity. These judges concluded that the Act of June 28, 1946, which brought referees within the Federal retirement system, had itself intended to impose the $10,000 annual ceiling later imposed by the 1949 Act, and that consequently petitioner could make no complaint when the Civil Service Commission simply corrected an arithmetical error (R. 24-30). No such contention had ever before been made—in Congress, in the Civil Service Commission, or in respondent's briefs or oral argument in the court below (see R. 31). The concurring opinion, finding no basis for thus evading the real issue presented, proceeded to consider it, but concluded that petitioner had no rights within the protection of the Constitution (R. 30-32). The judgment of the court below was accordingly entered in favor of respondent on July 15, 1952.

Reasons for Granting the Writ

The action taken against petitioner represents the first time in history, so far as we and respondent have been able to determine, that the United States has sought to repudiate its annuity obligations under the Civil Service Retirement Act. We believe not only that the repudiation was ineffective because inconsistent with the Fifth Amendment to the Constitution, but also that the decision below

which sanctioned it is of enormous importance to all Federal employees and fully worthy of review by this Court.

The majority of the court below, by a truly extraordinary course of argument, succeeded in evading the constitutional issue. We can demonstrate, very briefly, the fatal defects in the majority position. Strictly speaking, that discussion (Part I, *infra*) perhaps does not constitute a "Reason for Granting the Writ." It is, however, a necessary and unavoidable preliminary point; thereafter we can present the reasons which, we submit, make it apparent that this case fully warrants Supreme Court review, and reversal.

I

Under the Law Prior to October 5, 1949, Petitioner Was Entitled to an Annuity of $8,340 Per Annum

The majority opinion finds as "the natural construction" of the Act of June 28, 1946, covering the referees into the civil service retirement system "the intention of the Congress to limit the base of retirement to $10,000" (R. 29). The $10,000 figure is derived from the statutory provision which made that the maximum salary which could be fixed by the Judicial Conference for a full-time referee. See Sec. 6, *infra*, p. 19.

The concurring opinion of Judge Madden states, with complete accuracy, that there is "nothing whatever in the statute which suggests such a construction" (R. 30). The 1946 Act is simple and unambiguous: Section 6(d)(1) states simply that referees "shall be deemed to be officers and employees * * * within the meaning of Section 693 of Title 5"—the general coverage section of the Retirement Act (see page 24, *infra*). The statutory formula by which the amount of retirement annuities is calculated is nowhere modified, or even referred to; much less is there a suggestion that a wholly fictional $10,000 earnings ceil-

ing be superimposed on, or substituted for the usual calculation.

It is impossible to say that there is less, but certainly there is no more, support for the majority position in any legislative history. One of the basic defects in the fee system was the fact that under it some referees received quite large, and some very small, compensation. The proposed salary system had been under study in several successive Congresses, in which the committees were fully advised of the fact that some few referees had received, as fees, amounts which averaged well over $10,000 per year. See Hearings before the Special Subcommittee on Bankruptcy and Reorganization of the House Commitee on the Judiciary—on H. R. 4394, 77th Cong., 1st Sess., *e.g.*, pp. 88, 128, 165; and on H. R. 33 and 3338, 79th Cong., 1st Sess., *e.g.*, pp. 24, 29. See also Final Report, Attorney General's Committee on Bankruptcy Administration (1941), pp. 93-94; Table XXIII, p. 330, which was a basic source of information for the Committee (*e.g.*, Hearings on H. R. 4394, *supra*, pp. 4-37). The reports in both the House and Senate on H. R. 4160, 79th Cong., 1st Sess., which became the Act of June 28, 1946, not only referred to these prior hearings and the Final Report of the Attorney General's Committee (H. Rep. 1037, p. 2; S. Rep. 959, p. 2), but stated in unqualified terms that the bill extended to referees the benefits of the Retirement Act, and that "the same benefits will be received as are now accorded to other officers and employees in the judicial branch" (H. Rep., p. 7; S. Rep. p. 7). In fact, the hearings on H. R. 33 and 3338, *supra*, contain a letter from the Retirement Division of the Civil Service Commission stating that the language of the bill, which became the language of the act, was proper to give the referees the benefit of the Retirement Act, and that there would be no difficulty in computing their retirement benefits on the basis of their

prior fee earnings. Hearings, *supra*, pp. 28-29. In the debates on the floor of the House, the fact that some referees had had earnings from fees of more than $10,000 per year is specifically brought out, 91 Cong. Rec. 10014-15 (79th Cong., 1st Sess.).

Finally, if further evidence of the intention of Congress is necessary, it is sufficient to point out that in the report on the bill which became the Act of October 5, 1949, the House Committee states without qualification: "Although under present law the claim of the former referee in bankruptcy is valid * * *" (H. Rep. No. 1069, 81st Cong., 1st Sess., p. 2). There is little wonder that the brief for respondent below stated (p. 134): "The parties have agreed that under the Retirement Law as it read at the time of plaintiff's retirement, and as it continued to read until the 1949 amendment here in question, plaintiff was entitled to the annuity of $8340."

We submit that the majority of the court below has plainly misconstrued the 1946 Act. This Court has consistently ruled that rights claimed under the Constitution cannot be denied proper enforcement here by palpable evasions of the constitutional questions. *Cf. Neimotko* v. *Maryland*, 340 U. S. 268; *Craig* v. *Harvey*, 331 U. S. 367. Notwithstanding such erroneous preliminary findings and conclusions, this Court will examine the claim of right under the Constitution. We turn, then, to the reasons why we believe petitioner's claim on that issue warrants review by this Court.

II

The Decision of the Court Below Is in Probable Conflict With Applicable Decisions of This Court

Although this Court has never had occasion to rule on the extent to which annuitants under the Federal Retire-

ment Act are protected by the Constitution against a reduction of their annuities, it has on several recent occasions decided that issue with respect to contracts created under state legislation, and made clear the applicable principles. The decision below, which denies petitioner's claims to the protection of the Constitution, we believe is in probable conflict with the teachings of these opinions. *Indiana* ex rel. *Anderson* v. *Brand*, 303 U. S. 95; *Phelps* v. *Board of Education*, 300 U. S. 319; *Dodge* v. *Board of Education*, 302 U. S. 74. Moreover, in *Dismuke* v. *United States*, 297 U. S. 167, which sustained the right of an annuitant under the Federal Retirement Act to maintain a suit in the Court of Claims, although the Court did not reach the constitutional issue here involved, we believe that it indicated a view of the rights of annuitants contrary to that of the court below.

At the outset, it will be well to define specifically just what is here involved, and what is not. Petitioner is a former federal employee, who, at the time the Act was passed on October 5, 1949, which purported to reduce his annuity, had given the full consideration in tenure, age and salary deductions specified by the Retirement Act (5 U.S.C., Sec. 691(a), *infra*, p. 22). He had designated his choice of the several forms of annuities available to him under the Act, had filed claim for title (5 U.S.C., Secs. 698, 716, *infra*, pp. 24, 28), and had in fact retired on January 1, 1949 (R. 17). His claim for "title to annuity" had been adjudicated by the Civil Service Commission, and the certificate of annuity under seal required by the Act had been issued to him (5 U.S.C., Sec. 717, *infra*, p. 28).[1] He had received an annuity in the full amount he now claims for almost a year. We need not consider, therefore, nor do we challenge, the

[1] Section 717 of The United States Code erroneously omits the words "under seal" which are contained in the basic law. Act of May 22, 1920, 41 Stat. 614, Sec. 7. The Federal Personnel Manual of the Civil Service Commission sets forth the correct language. P. Z1-67.

plenary power of Congress to change the incidents of the retirement system for those officers and employees who have not yet retired under it. Nor need we consider the problem of when the rights of an employee become fully vested—whether, in other words, Commission adjudication and certification under seal are necessary. Petitioner, here, is plainly possessed of every right which the full operation of the Retirement Act may create.[2]

One aspect of the legal question is also not in controversy. Congress may, if it wishes, authorize the creation of contracts which, when thereafter made, may not be unilaterally revoked or altered. *Lynch* v. *United States*, 292 U. S. 571; *New Jersey* v. *Yard*, 95 U. S. 104, 114. In the *Lynch* case, the Court held that War Risk Insurance Policies were contracts, and "being contracts, are property and create vested rights," and that consequently a statute purporting to take away the rights under the contract was in conflict with the due process clause of the Constitution. See also *Perry* v. *United States*, 294 U. S. 330, 352; *United States* v. *Zazove*, 334 U. S. 602, 611. Congress may, in other words, create rights in individuals which are beyond the power of subsequent Congresses to modify or revoke.

The decisions in the *Brand*, *Phelps* and *Dodge* cases make it clear that in determining whether an annuity is a contract which must be respected, the touchstone is the intent of Congress in the act pursuant to which the annuities are created. The Court has also made clear that the burden is on the one who asserts a contractual right to demonstrate that Congress intended to create one. *Dodge* v. *Board of*

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[2] Petitioner is the only referee who was in that position on October 5, 1949. See H. Rep. 1069, 81st Cong., 1st Sess., p. 2. It may be noted that subsequent developments have substantially modified the facts stated in the Report; the fee of $220,000 mentioned (p. 2) as having been received by one referee in 1947 was later substantially disallowed by the Court of Appeals. *In re International Match Corp.*, 190 F. 2d 458 (2d Cir. 1951).

Education, 302 U. S. 74, 79. In the case of the Civil Service Retirement Act, the origins and nature of the Act itself and the consistent legislative and administrative construction of it over the past thirty years amply discharge that burden. A full exposition of the proof of that statement may more properly await a brief on the merits; we believe that even a summary statement, however, will show how far the court below has departed from the teachings of the decisions of this Court.

1. Congress had considered a retirement system for federal employees for many years prior to 1920. However, from 1916 on, Congress had under consideration the several bills out of which ultimately came the Retirement Act of 1920. Controversy was general over whether the plan should be on a non-contributory or a contributory basis, the larger cost of a system of the former type being overbalanced, in the opinion of many persons, by its avoidance of the contractual rights which employees would acquire under a system of the latter type. See, *e.g.*, Civil Service Commissioner Galloway (Hearings before Senate Committee on Civil Service and Retrenchment on S. 157, etc., 65th Cong., 1st Sess., p. 180); J. W. Starr, Emeritus President, United States Civil Service Retirement Association (*id.*, p. 240); 7th Annual Report, Carnegie Foundation (Hearings before Senate Committee on Civil Service and Retrenchment on S. 3079, etc., 64th Cong., 1st Sess., p. 89). The controversy had not been finally resolved when hearings opened in the 66th Congress on S. 1699, which set up a contributory system, and which became the Retirement Act. Secretary of War Newton D. Baker, for example, unsuccessfully opposed the bill because of the contractual obligations which would devolve upon the Government (Hearings before the Senate Committee on Civil Service and Retrenchment, 66th Cong., 1st Sess., p. 25). The final answer of Congress was stated in 1920 by the manager of

the bill on the House floor who said: "The underlying principle of this bill is the recognition of the contractual relationship between the Government on the one hand as the employer and the Civil Service personnel on the other hand as employees." 59 Cong. Rec. 6288.

2. Not only was there a plain Congressional intent to create contractual rights, but the structure and substance of the Act make it apparent that the annuities contemplated under it are intended to be contracts. The Court accurately characterized the Act as a whole in the *Dismuke* case (297 U.S. at p. 169):

> "Section 8(a) of the Retirement Act declares that, under conditions specified, the employee 'shall be entitled to an annuity payable from the civil service retirement and disability fund.' The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States."[3]

The positive rights and obligations intended by the Act are not confined to one section; they are reflected throughout the Act. Section 1(a), *infra*, p. 22, declares that an employee, who has satisfied the specified conditions—

> "shall, upon separation from the service, be paid an annuity computed as provided in Section 4 of this Act."

Section 4, *infra*, p. 24, provides that the—

> "annuity of an officer or employee retired under this Act shall be a life annuity, terminable upon the death of the annuitant and shall be in amount equal to—"

[3] Section 8(a) of the Act of June 16, 1933 (48 Stat. 283, 305, codified as 5 USC, Sec. 736(a)), remains unchanged. The same mandatory phraseology was written into Section 1(b) and (d) of the Act of January 24, 1942 (56 Stat. 13; 5 USC 691(b) and (d)); into Section 1(e) when it was added by the Act of August 8, 1946 (60 Stat. 939; 5 USC 691(e); and into Section 1(a) when it was amended by the Act of February 28, 1948 (62 Stat. 48, 5 USC 691(a). See Appendix, *infra*, pp. 22-24.

the product of one of two precise formulae. The same indication of positive employee rights is reflected in Sections 5, 13 and 17, *infra*, pp. 27-29, 30.

Statutory conditions, likewise fully defined and mandatory, are also imposed on employees in consideration of the rights which they acquire under the Act. The primary consideration is tenure in the federal service. Sections 1, 5, *infra*, pp. 22, 27. Secondary considerations fix the monetary value of the annuity to which title will be established by reason of tenure. These are the rate of pay of the particular employee (Section 4, *infra*, p. 24), and the amount of his contribution to the retirement fund, either by deductions from his pay during the whole of his tenure, or by the deposit, if he so elects, of stated percentages of his pay during the period of his federal employment prior to the date deductions started as to him. Section 9, *infra*, p. 31. Section 10, *infra*, p. 29, imposes automatic retirement deductions, to which, by Section 13, *infra*, p. 30, "every employee coming within the provisions of this Act shall be deemed to consent and agree."

Plainly, the Act holds out to the employee the offer of a contract to pay retirement benefits on specified conditions stated in direct relation to the consideration to be given by the employee. The service of the employee, past and future, constitute the bulk of the consideration—that the government may retain in its service its experienced employees, and secure the employment of others. As a further consideration, the employee makes contributions. Unquestionably, this is adequate consideration on both sides. *Retirement Board* v. *McGovern*, 316 Pa. 161, 174 Atl. 400, 406 (1934); *Roddy* v. *Valentine*, 268 N.Y. 228, 197 N.E. 260, 262 (1935); *Dryden* v. *Board of Pension Commissioners*, 6 Cal. (2d) 575, 59 P. (2d) 104, 106 (1936). See also 32 Ops. Atty. Gen. 552 (1921). Even were it

inadequate by common law standards, however, that would not be determinative; the statute itself serves as the measure of the requirements which need be met to create the contractual obligation. *Indiana* ex rel. *Anderson* v. *Brand*, 303 U.S. 95, 106. By the same token, it is irrelevant that for a large part of all federal employees participation in the retirement system is compulsory. That feature does not detract from the accomplishment of the Government's purpose—persuading experienced people to remain and new employees to seek employment with it.

Moreover, it is quite clear that for the substantial number of officers and employees in the legislative branch whose participation is optional rather than mandatory (see 5 USC, Sec. 693(a), *infra*, p. 24), Congress plainly intended that they should, upon acceptance, acquire no greater security in annuity rights than federal employees generally who are "deemed to consent" by Section 13 (5 USC, Sec. 722, *infra*, p. 30). See *e.g.*, S. Rep. No. 921 on H.R. 3487 (optional coverage to legislative employees), 77th Cong., 1st Sess., p. 2; S. Rep. No. 1400 on S. 2177 (optional coverage to Members of Congress) 79th Cong., 2d Sess., pp. 8-9, 37; 92 Cong. Rec. 6370, 6567, 10050, 10098 (79th Cong., 2d Sess.).

Moreover, the statutory language used in defining the obligation of the Government and the correlative rights of the employee is consistent only with the creation of a vested, contractual right. The Civil Service Commission is directed by Section 13 to adjudicate "title to annuity" (5 USC, Sec. 717), which "shall continue during the life of the annuitant" (*id.*, Sec. 718), and an annuitant is defined as one who has met all requirements "for title" (*id.*, Sec. 718a). Bouvier states "a good title is that which entitles a man by right to a property or estate" (3d ed., p. 3281). Cooley, in his *Constitutional Limitations* (8th

ed., p. 749), pointing out that a right cannot be considered a "vested right" unless it is something more than an expectation of the continuance of present laws, adds that to attain that status "it must have become a title, legal or equitable, to the present or future enjoyment of property." The use by Congress of the word "title" cannot have been an inadvertence, and is inexplicable except as indicating precisely the intent to create a vested, indefeasible right with which it is linked by Bouvier and Cooley.[4]

Furthermore, the same Section 13 contains a specific requirement for a writing on behalf of the Government evidencing the contractual obligation—a written certificate, under seal. Cf. *Dodge* v. *Board of Education*, 302 U.S. 74, 78.[5]

Of course, there is no "bargaining", in the sense in which that word is used in commercial transactions, but in statutory contracts there never is; the employee must take the contract as he finds it, but contractual rights nevertheless arise. Cf. *Lynch* v. *United States*, 292 U.S. 571; *United States* v. *Zazove*, 334 U.S. 602, 611, n. 12. Neither is it important that the purpose of Congress in entering into the contracts was not commercial, but had elements of a benevolent purpose for older employees. *Lynch* v. *United States*, 292 U.S. 571, 576-577.

3. When we turn from the original act and consider its history in subsequent Congresses, we find additional evidence of the intent to create vested contractual rights in annuitants. Perhaps the most striking evidence is that supplied by the action of Congress in the drastic days of

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[4] It is perhaps appropriate to add that the Federal Personal Manual of the Civil Service Commission represents to present and future employees that they will receive, upon retirement, a "vested right to a future annuity", Sec. R5, p. 37.

[5] A written contract, of course, is not essential. See e. g., *Ball* v. *Board of Trustees*, 71 N.J.L. 64, 58 Atl. 111 (1904); *Stevens* v. *Minneapolis Fire Dept. Relief Ass'n.*, 124 Minn. 381, 145 N.W. 35 (1914).

the Economy Act of 1933, when all expenditures of the Government were reduced, save only those which were recognized as beyond the power of Congress to change (see *Lynch* v. *United States*, 297 U.S. 571, 585-586). Annuities under the Retirement Act were expressly exempted from the sweeping reductions. Act of March 20, 1933, Title II, Sec. 2, 48 Stat. 12. Similarly, in the numerous amendments which have been made to the Retirement Act since 1920, Congress has been meticulous to direct, in specific terms, that no change should be applied or construed to reduce annuities already granted. See, *e.g.*, Act of July 3, 1926, Sec. 8, 44 Stat. 904. Indeed, there have been numerous references in the legislative records of these amendatory statutes to the vested rights of annuitants. See, *e.g.*, H. Rep. 1285, 77th Cong., 1st Sess., p. 2; H. Rep. 615, 80th Cong., 1st Sess., p. 3; S. Rep. 268, 81st Cong., 1st Sess., p. 1. No statute until the Act of October 5, 1949, has challenged or ever sought to reduce annuity payments to existing annuitants. Moreover, Congress has never attempted to avoid the vested, contractual rights of annuitants by express reservation of a power to reduce the amounts of their annuities in the future, as of course it could have done, and indeed has done—in other connections. See National Service Life Insurance Act of 1940, 54 Stat. 1008, 38 USC, Sec. 802(i). It is fair to add that the Bureau of Internal Revenue has for many years treated annuities under the Retirement Act identically with annuities arising by private contracts (Treas. Reg. 111, Sec. 29.22(b)(2)-2) and unlike pensions. Repeated reenactment of Section 22 of the Code must be taken as a confirmation by Congress that the Treasury position correctly reflects the incidents of the Retirement Act. *Hassett* v. *Welch*, 303 U.S. 303, 312.

We submit, therefore, that abundant evidence exists that Congress did not create a system of mere gratuities

or pensions, which might be modified or revoked at will after an employee's retirement, but that it intended to create, and did create, a plan for vested, contractual annuities which would be secure to the annuitant for the remainder of his life. Cf. 32 Ops. Att'y. Gen. 552 (1921). The decision in *Dodge* v. *Board of Education*, 302 U.S. 74, relied upon in the concurring opinion below, is not to the contrary; indeed, its teaching, as we have pointed out, is that the intent of the legislative body is determinative, and that if the intent is to tender a contract to the employee, the Constitution protects it thereafter against unilateral legislative modification. In the *Dodge* case, and in the earlier decision in *Phelps* v. *Board of Education*, 300 U.S. 319, the court simply concluded that no intent to create contractual rights was evident in the particular state statutes there involved. There are, of course, many state retirement statutes where the contrary conclusion has been reached. E.g., *Retirement Board* v. *McGovern*, 316 Pa. 161, 174 Atl. 400 (1934); *Roddy* v. *Valentine*, 268 N.Y. 228, 197 N.E. 260 (1935); *Trotzier* v. *McElroy*, 182 Ga. 719, 186 S.E. 817 (1936); *Crawford* v. *Teachers Retirement Fund Ass'n.*, 164 Ore. 77, 99 P. (2d) 729 (1940); *State* v. *Lee*, 147 Fla. 37, 2 So. (2d) 127, 133 (1941). That the *Dodge* and *Phelps* cases do not modify the principle on which we rely is shown by the later decision of the Court, sustaining an employee's right under the Constitution, in *Indiana* ex rel. *Anderson* v. *Brand*, 303 U.S. 95; cf. *United States* v. *Zazove*, 334 U.S. 602, 611.

III

The Court Below Has Decided a Question Which Has Not Been, But Which Should Be Settled by This Court

If petitioner has no constitutional protection here, then neither does any other retired federal employee, and neither will any federal employee who retires in the future. Yet,

as we have shown, both the nature of the Retirement Act and the express representations of the Civil Service Commission cannot have failed to lead federal employees generally to believe that they were more than mere pensioners, with what the concurring opinion below calls "a vague sort of equity" (R. 31). Not only do we assert that this general belief is justified, but we think it goes without saying that a vindication of that belief, or an authoritative denial of it, is of the highest importance to federal employees generally. That petitioner, because of the limited scope of the Act of October 5, 1949, occupies a perhaps unique position, cannot obscure the fact that the decision below affects, in radical fashion, the annuity rights created by the Retirement Act for all present, and indeed all future, federal employees. Petitioner has been deprived of a portion of his actual annuity, but every federal annuitant, if petitioner's rights are not protected, has also suffered a less tangible, but equally real, loss in security.

Conclusion

We believe, therefore, that a writ of certiorari to the Court of Claims should be granted.

Respectfully submitted,

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October 1952.

APPENDIX

PERTINENT PROVISIONS OF SECTIONS 5 AND 6 OF THE BANKRUPTCY ACT OF JUNE 28, 1946, 60 STAT. 326, 11 USC 67 AND 68.

§ 67. [Act, Sec. 5] *Duties of referees; prohibition against practice of law.*

* * * * * * *

(b) Referees shall not (1) act in cases in which they are directly or indirectly interested; or (2) purchase, directly or indirectly, any property of an estate in any proceeding under this title. Active full-time referees shall not exercise the profession or employment of counsel or attorney, or be engaged in the practice of law. Active part-time referees, and referees receiving benefits under paragraph (1) of subdivision (d) of section 68 of this title, shall not practice as counsel or attorney in any proceeding under this title.

* * * * * * *

§ 68. [Act, Sec. 6] *Compensation of referees; referees' salary and expense funds; retirement of referees.*

(a) Referees shall receive as full compensation for their services salaries to be fixed by the conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, at rates not more than $10,000 per annum for full-time referees, and not more than $5,000 per annum for part-time referees. In fixing the amount of salary to be paid to a referee, consideration shall be given to the average number and the types of, and the average amount of gross assets realized from, cases closed and pending in the territory which the referee is to serve, during the last preceding period of ten years, and to such other factors as may be material. Disbursement of such salaries shall be made monthly by or pursuant to the order of the Director.

(b) The conference, in the light of the recommendations of the councils, made after advising with the dis-

trict judges of their respective circuits, and of the Director, may increase or decrease any salary, with the limits prescribed in subdivision a of this section, if there has been a material increase or decrease in the volume of business or other change in the factors which may be considered material in fixing salaries: *Provided, however,* That during the tenure of any full-time referee his salary shall not be reduced below that at which he was originally appointed under this amendatory Act, and during any term of any such referee his salary shall not be reduced below the salary fixed for him at the beginning of that term: *And provided further,* That no salary fixed under the provisions of this section for a full-time referee shall be changed more often than once in any two years or in an amount of less than $250.

(c)(1) Except as otherwise provided in this title, there shall be deposited with the clerk, at the time the petition is filed in each case, and at the time an ancillary proceeding is instituted, (a) $17 for each estate for the referees' salary fund, and (b) $15 for each estate for the referees' expense fund, as hereinbelow established: *Provided, however,* That in cases of voluntary bankruptcy such fees, as well as the filing fees of the clerk and trustee, may be paid in installments, if so authorized by General Order of the Supreme Court of the United States.

(2) Additional fees for the referees' salary fund and for the referees' expense fund shall be charged, in accordance with the schedules fixed by the conference * * *.

(3) Charges for the expense of special services relating to or in connection with proceedings before referees shall be made and collected by the referees in accordance with regulations to be prescribed by the Director, with the approval of the conference, and the proceeds shall be paid by the referees to the clerk for transmission to the Treasury of the United States for deposit in the referees' expense fund.

(4) A referee's salary fund and a referee's expense fund shall be established in the Treasury of the United States, and the amounts of the various fees and allowances collected by the clerks for the services of referees, and for their ex-

penses, including the fees, allowances and charges for their services and expenses as conciliation commissioners and as special masters under this title, shall be covered into the Treasury of the United States for the account of such salary fund and expense fund. The salaries of the referees in active service shall be paid out of the annual appropriations from such salary fund, and the expenses of the referees, including the salaries of their clerical assistants, shall be paid out of annual appropriations from such expense fund, by the United States. Any deficiencies of such salary fund or expense fund shall be paid out of any funds in the Treasury of the United States not otherwise appropriated, and appropriations to pay such deficiencies are authorized: *Provided, however,* That there shall be covered into miscellaneous receipts of the Treasury of the United States in any subsequent year so much of the surplus, if any, arising in the salary fund or expense fund respectively as may be necessary to reimburse the Treasury of the United States for payments made on account of such respective funds in any prior year.

* * * * * * *

(5)(d)(1) All referees in bankruptcy and employees in the offices of such referees shall be deemed to be officers and employees in the judicial branch of the United States Government within the meaning of section 693 of Title 5.

(2) Any referee who has retired or been retired under the provisions of paragraph (1) of this subdivision may, if called upon by a judge of a court of bankruptcy, perform, without compensation, such duties of a referee, conciliation commissioner or special master under this title, within the jurisdiction of such court, as such referee may be able and willing to undertake: *Provided, however,* That when so acting, compensation for his services shall be allowed and paid or deposited and his expenses shall be allowed and paid, as in the case of an active referee.

Pertinent Provisions of Civil Service Retirement Act as Amended to January 1, 1949

Title 5, U. S. Code, Ch. 14, Sections 691, *et seq.*, 5 USCA 691 *et seq.* (Supp. 1948): Act of May 29, 1930, 46 Stat. 468, as amended and reenacted by Acts of July 3, 1930, 46 Stat. 1016, 1017; June 23, 1936, 49 Stat. 1888; August 4, 1939, 53 Stat. 1200, 1201; October 14, 1940, 54 Stat. 1116, January 24, 1942, 56 Stat. 13, 15, 16, 17; March 7, 1942, 56 Stat. 143, 147; November 9, 1945, 59 Stat. 577; December 21, 1945, 59 Stat. 621; July 24, 1946, 60 Stat. 659; August 2, 1946, 60 Stat. 850; August 8, 1946, 60 Stat. 939; June 21, 1947, 61 Stat. 135; July 11, 1947, 61 Stat. 307; January 26, 1948, 62 Stat. 5; February 28, 1948, 62 Stat. 48, 49, 50, 53, 57, 58; June 19, 1948, 62 Stat. 504; June 25, 1948, 62 Stat. 670; June 30, 1948, 62 Stat. 1163; July 2, 1948, 62 Stat. 1221.

§ 691. [Act, section 1] *Voluntary retirement; involuntary retirement of disqualified employees; retirement of investigatory personnel; annuity payments after certain periods of service—(a) Annuity rate upon voluntary separation at certain age*

Any officer or employee to whom sections 691, 693, 693-1, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b, and 736c of this title apply who shall have attained or shall hereafter attain the age of sixty years and have rendered at least thirty years of service computed as prescribed in section 707 of this title, or who shall have attained or shall hereafter attain the age of sixty-two years and have rendered at least fifteen years of such service, shall, upon separation from the service, be paid an annuity computed as provided in section 698 of this title.

Annuity rate reduction upon voluntary separation at age 55

(b) Any officer or employee to whom sections 691, 693, 693-1, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b and 736c of this title apply who shall have attained or shall hereafter attain the age of fifty-five years and have rendered at least thirty years of service computed as prescribed in section 707 of this title shall, upon

separation from the service, be paid an annuity computed as provided in section 698 of this title, reduced by one-fourth of 1 per centum for each full month such officer or employee is under the age of sixty years.

Annuity rate reduction upon involuntary separation at age 55; effective date

(c) Any officer or employee to whom sections 691, 693, 693-1, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b and 736e of this title apply after having rendered at least twenty-five years of service computed as prescribed in section 707 of this title, shall, upon involuntary separation from the service not by removal for cause on charges of misconduct or delinquency, be paid an immediate life annuity computed as provided in section 698 of this title reduced by one-fourth of 1 per centum for each full month such officer or employee is under the age of sixty years. This subsection shall become effective July 1, 1947.

• • •

Life annuity at age 55; effective date

(e) Any officer or employee to whom sections 691, 693, 698, 707, 708, 709-715, 716 to 719-1, 720-725, 727-729, 730, 731, 733, 736b, and 736e of this title apply who, after having attained the age of fifty-five and after having rendered at least twenty-five years of service computed as prescribed in section 707 of this title,

(1) shall have been involuntarily separated from the service not by removal for cause on charges of misconduct or delinquency between July 1, 1945, and June 30, 1947, both dates inclusive; or

(2) shall have been voluntarily separated from the service between such dates if such officer or employee had accepted a position with a lower rate of basic salary, pay, or compensation after having been involuntarily separated (not by removal for cause on charges of misconduct or delinquency) between such dates from a position with a higher rate of basic salary, pay, or compensation, and was receiving less than such higher rate at the time of his voluntary separation,

shall be paid an immediate life annuity beginning on the first day of the month following the date of final separation from the service. Such annuity shall have a value equal to an annuity computed as provided in section 698 of this title reduced by one-sixth of 1 per centum for each full month any such officer or employee is (A) under the age of sixty years if he has rendered at least thirty years of service computed as prescribed in section 707 of this title, or (B) under the age of sixty-two years if he has rendered less than thirty years of service computed as prescribed in section 707 of this title.

§ 693. [Act, section 3(a)] *Employees included*

"(a) This chapter shall apply to all officers and employees in or under the executive, judicial, and legislative branches of the United States Government, and to all officers and employees of the municipal government of the District of Columbia, except elective officers in the executive branch of the Government, and to all officers and employees of the National Library for the Blind at the election of such officers and employees as herein provided, and to all officers and employees of the Columbia Institution for the Deaf: *Provided*, That this chapter shall not apply to any such officer or employee of the United States or of the municipal government of the District of Columbia subject to another retirement system for such officers and employees of such governments: *Provided further*, That this chapter shall not apply to any officer or employee in the legislative branch of the Government within the classes of officers and employees which were made eligible for the benefits of this chapter by sections 693b-693d, 698b, 715d, and 719a of this title, until he gives notice in writing to the disbursing officer by whom his salary is paid, of his desire to come within the purview of this chapter; and any officer or employee within such classes may, within sixty days after January 24, 1942, withdraw from the purview of this chapter by giving similar notice of such desire. • • •"

§ 698 [Act, section 4] *Method of computing annuities*

(a) The annuity of an officer or employee retired under sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1,

720-722, 724, 725, 727-729, 730, 731, 733, 736b, and 736c of this title shall be a life annuity, terminable upon the death of the annuitant and shall be an amount equal to the following: (1) 1½ per centum of the average annual basic salary, pay, or compensation received by the officer or employee during any five consecutive years of allowable service at the option of the officer or employee multiplied by the years of service, or (2) 1 per centum of the average annual basic salary, pay, or compensation received by the officer or employee during any five consecutive years of allowable service at the option of the officer or employee multiplied by the years of service, plus a sum equal to $25 for each year of such service: Provided, That in no case shall the annuity exceed an amount equal to 80 per centum of the highest average annual basic salary, pay, or compensation received by the officer or employee during five consecutive years of allowable service.

(b) Any officer or employee, if a husband, retiring under the provisions of sections 691, 715 or 710-714 of this title may at the time of his retirement elect to receive in lieu of the life annuity described herein a reduced annuity and an annuity after his death payable to his surviving widow designated by him at time of retirement equal to 50 per centum of such life annuity. The annuity of the officer or employee making such election shall be equal to 90 per centum of such life annuity, reduced by three-fourths of 1 per centum of such life annuity for each full year, if any, his wife is under the age of sixty at the date of such retirement, but shall in no case be less than 75 per centum of such life annuity. The annuity of such widow shall begin on the first day of the month in which the death of the husband occurs or the first day of the month following the widow's attainment of age fifty, whichever is the later, and such annuity or any right thereto shall terminate upon her death or remarriage.

(c) Any unmarried officer or employee in good health retiring under the provisions of section 691 or 751 of this title may at the time of his retirement elect to receive in lieu of the life annuity described herein a reduced annuity payable to him during his life, and an annuity after his death payable to a survivor annuitant having an insurable inter-

est in such officer or employee, duly designated in writing and filed with the Civil Service Commission at the time of his retirement, during the life of such survivor annuitant equal to 50 per centum of such reduced annuity and upon the death of such survivor annuitant all payments shall cease and no further annuity shall be due and payable. The annuity hereunder payable to the officer or employee shall be 90 per centum of the life annuity otherwise payable if the survivor annuitant is the same age or older than the annuitant, or is less than five years younger than the annuitant; 85 per centum if the survivor annuitant is five but less than ten years younger; 80 per centum if the survivor annuitant is ten but less than fifteen years younger; 75 per centum if the survivor annuitant is fifteen but less than twenty years younger; 70 per centum if the survivor annuitant is twenty but less than twenty-five years younger; and 60 per centum if the survivor annuitant is twenty-five or more years younger. No such election shall be valid until the retiring officer or employee shall have satisfactorily passed a physical examination as prescribed by the Civil Service Commission. No person shall be eligible to receive an annuity under this subsection and an annuity under subsection (c) of section 724 of this title based upon the service of the same officer or employee, covering the same period of time.

(d) For the purpose of sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b, and 736c of this title all periods of service shall be computed in accordance with section 707 of this title, and the monthly annuity installment shall be fixed at the nearest dollar.

(e) Except as provided in sections 931 and 935(a) of this title, the term "basic salary, pay, or compensation", wherever used in sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b and 736c of this title shall be so construed as to exclude from the operation of said sections all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the position as fixed by law or regulation.

§ 707 [Act, section 5] *Computation of period of service.*

Subject to the provisions of section 736b of this title, the aggregate period of service which forms the basis for calculating the amount of any annuity provided in sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b and 736c of this title shall be computed from the date of original employment, whether as a classified or an unclassified officer or employee in the civil service of the United States, or in the service of the District of Columbia, including periods of service at different times and in one or more departments, branches, or independent offices, or the legislative branch of the Government, and also periods of service performed overseas under authority of the United States, and periods of honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States; and in the case of an officer or employee, however, who is eligible for and receives retired pay on account of military or naval service, the period of service upon which such retired pay is based shall not be included, except that in the case of an officer or employee who is eligible for and receives retired pay on account of a service-connected disability incurred in combat with an enemy of the United States or resulting from an explosion of an instrument of war, the period of the military service shall be included: Provided, that an officer or employee must have served for a total period of not less than five years exclusive of such military or naval service before he shall be eligible for annuity under said sections. Nothing in said sections shall be construed as to affect in any manner an officer's or employee's right to retired pay, pension, or compensation in addition to the annuity herein provided.

In computing length of service for the purposes of said sections, all periods of separation from the service, and so much of any leaves of absence as may exceed six months in the aggregate in any calendar year, shall be excluded, except leaves of absence granted employees while performing active military or naval service in the Army, Navy, Marine Corps, or Coast Guard of the United States or

while receiving benefits under sections 751-791 and 793 of this title, and in the case of substitutes in the Postal Service credit shall be given from date of original appointment as a substitute.

No officer or employee to whom sections 691, 693, 698, 707, 708, 709-715, 716 to 719-1, 720-725, 727-729, 730, 731, 733, 736b, and 736c of this title applies who during the period of any war, or of any national emergency as proclaimed by the President or declared by the Congress, has left or leaves his position to enter the armed forces of the United States shall be considered as separated from such position for the purposes of said sections by reason of his service with the armed forces of the United States. This paragraph shall not be so construed as to prevent the payment of refunds as provided by sections 733(a) or 724(b) of this title.

In determining the aggregate period of service upon which the annuity is to be based, the fractional part of a month, if any, in the total service shall be eliminated.

§ 716 [Act, section 13] *Application for retirement*

Applications for annuity shall be in such form as the Civil Service Commission may prescribe, and shall be supported by such certificates from the heads of departments, branches, or independent offices of the Government in which the applicant has been employed as may be necessary to the determination of the rights of the applicant.

§ 717 [Act, section 13] *Same; determination; certificate of retirement*

Upon receipt of satisfactory evidence the Civil Service Commission shall forthwith adjudicate the claim of the applicant, and if title to annuity be established, a proper certificate shall be issued to the annuitant.*

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* The words "under seal" are erroneously omitted from Section 717, Title 5 of the United States Code, but they are contained in the basic Statute itself, 41 Stat. 614, 617. See note p. 9, *supra*.

§ 718 [Act, section 13] *Commencement and duration of annuity*

An annuity granted for retirement under the provisions of section 691 or 715 of this title shall commence the first day of the month following the date of separation from the service, or on the first day of the month following the month in which salary shall cease provided the employee meets the age and service requirements for retirement at that time, and shall continue during the life of the annuitant. An annuity granted under the provisions of sections 710-714 or 733 of this title shall be subject to the limitations specified in said sections.

§ 718a [Act, section 13] *Definition of annuitant*

The term "annuitant" as used in this chapter shall include any employee who has met all requirements of the chapter for title and has filed claim therefor, notwithstanding final administrative action was not taken by the Civil Service Commission prior to his death. Nothing in sections 716-718a and 725 of this title shall be so construed as to reduce any benefit otherwise payable.

§ 729 [Act, section 10] *Deductions from salaries; amount; civil-service retirement and disability fund*

Beginning as of July 1, 1942, there shall be deducted and withheld from the basic salary, pay, or compensation of each officer or employee to whom sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b, and 736c of this title applies a sum equal to 5 per centum of such officer's or employee's basic salary, pay, or compensation: Provided, That from and after the first day of the first pay period which begins after June 30, 1948, there shall be deducted and withheld from the basic salary, pay, or compensation of each officer or employee to whom said sections applies a sum equal to 6 per centum of such officer's or employee's basic salary, pay, or compensation. The amounts so deducted and withheld from the basic salary, pay, or compensation of each officer or employee shall, in accordance with such procedure as

may be prescribed by the Comptroller General of the United States, be deposited in the Treasury of the United States to the credit of the civil-service retirement and disability fund created by the Act of May 22, 1920, and said fund is appropriated for the payment of annuities, refunds, and allowances as provided in section 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b, and 736c of this title.

§ 722 [Act, section 13] *Consent of employee to deductions deemed given*

Every employee coming within the provisions of this chapter shall be deemed to consent and agree to the deductions from salary, pay, or compensation as provided herein, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services rendered by such employee during the period covered by such payment, except the right to the benefits to which he shall be entitled under the provisions of said chapter, notwithstanding the provisions of sections 167 and 168 of the Revised Statutes of the United States, and section 43 of this title, and of any other law, rule, or regulation affecting the salary, pay, or compensation of any person or persons employed in the civil service to whom this chapter applies.

§ 725 [Act, section 17] *Times for payment of annuities*

Annuities granted under the terms of sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b, and 736c of this title shall accrue monthly and shall be due and payable in monthly instalments on the first business day of the month following the month or other period for which the annuity shall have accrued. Payment of all annuities, refunds, and allowances granted hereunder shall be made by checks drawn and issued by the Treasury Department in such form and manner and with such safeguards as shall be prescribed by the Civil Service Commission in accordance with the laws, rules, and regulations governing accounting that may be found applicable to such payments.

§ 736b [Act, section 9] *Credit for past service*

Each officer or employee within the purview of sections 691, 693, 693-1, 698, 707, 708, 709-715, 716 to 719-1, 720-722, 724, 725, 727-729, 730, 731, 733, 736b and 736c of this title shall deposit, with interest at 4 per centum per annum to December 31, 1947, and 3 per centum per annum thereafter, compounded on December 31 of each year, to the credit of the "civil-service retirement and disability fund" a sum equal to 2½ per centum of his basic salary, pay, or compensation received for services rendered after July 31, 1920, and prior to July 1, 1926; 3½ per centum of the basic salary, pay, or compensation for services rendered from and after July 1, 1926, and prior to July 1, 1942; 5 per centum of said basic pay, salary, or compensation for services rendered from and after July 1, 1942, and prior to the first day of the first pay period which begins after June 30, 1948, and also 6 per centum thereafter, covering service during which no deductions were withheld for deposit in the said fund. Such interest shall not be required for any period during which the officer or employee is separated from the service. Each such officer or employee may elect to make such deposits in installments during the continuance of his service in such amounts and under such conditions as may be determined in each instance by the Civil Service Commission. The amount so deposited shall be credited to the individual account of the officer or employee in the said fund. Notwithstanding the failure of an officer or employee to make such deposit, credit shall be allowed for the service rendered, but the annuity of such employee shall be reduced by an amount equal to 10 per centum of the amount of such deposit, unless the officer or employee shall elect to eliminate such service entirely from credit under said sections: Provided, That no deposit shall be required for any service rendered prior to August 1, 1920, or for periods of honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States.

ACT OF OCTOBER 5, 1949, C. 602, 63 STAT. 704, 5 USC 698(e), IN AMENDMENT OF THE CIVIL SERVICE RETIREMENT ACT.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 4(e)3, of the Civil Service Retirement Act of May 29, 1930, as amended, is amended by substituting a colon for the period at the end thereof and adding the following: '*Provided,* That in cases of officers and employees paid on a fee basis, the maximum "basic salary, pay or compensation" which may be used for the purposes of this Act shall be $10,000 per annum.'

"SEC. 2. This amendment shall become effective April 1, 1948."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 376

PETER B. OLNEY, *Petitioner*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 24-32) are reported at 105 F. Supp. 1005.

JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1952 (R. 33). The petition for a writ of certiorari was filed on October 3, 1952.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Effective in 1947, Congress amended, in 1946, the provisions of the Bankruptcy Act relating to the compensation of referees in bankruptcy, abolishing compensation by fee and substituting a salary system with a $10,000 maximum salary. It also brought referees within the coverage of the Civil Service Retirement Act. Under the Retirement Act, benefits are proportional to the employee's yearly earnings during his period of most highly compensated service. Three referees retired under the new law and claimed benefits based on past fees in excess of $10,000 a year. On learning of these claims, Congress, in 1949, passed another statute providing that benefits of employees compensated by fee should be limited to amounts computed on a maximum base of $10,000. The questions presented are:

1. Whether the court below correctly construed the 1946 Bankruptcy Act amendments as limiting benefits to amounts based on the $10,000 maximum.

2. Whether the 1949 amendment, as applied to future installments on the annuities of the three retired referees, deprives them of property without due process of law.

STATUTES INVOLVED

The pertinent provisions of the Civil Service Retirement Act, Section 4, 41 Stat. 614, 46 Stat. 468, as amended February 28, 1948, 62 Stat. 48, 49, as of the time of petitioner's retirement on December 31, 1948, 5 U.S.C. (Supp. II) 691 *et seq.* are set forth in Appendix A, *infra,* pp. 16-17. The pertinent provisions of the Act of June 28, 1946, giving retirement status to referees in bankruptcy, 60 Stat. 323, 326-328, 11 U.S.C. 68, are set forth in Appendix B, *infra,* pp. 17-19. The Act of October 5, 1949, c. 602, 63 Stat. 704, 5 U.S.C. (Supp. V) 698(a), amending the Civil Service Retirement Act, is set forth in Appendix C, *infra,* p. 19.

STATEMENT

Petitioner served as a referee in bankruptcy in the United States District Court for the Southern District of New York from 1922 until his retirement on December 31, 1948 (Fdg. 3, R. 14-15). From the time of his appointment until July 1, 1947, referees in bankruptcy were not covered by the Civil Service Retirement Act. Beginning July 1, 1947, however, Congress reorganized the system of referees' compensation. It abolished the then existing system of compensation through fees based upon the assets of bankrupt estates, gave the referees fixed salaries with a maximum of $10,000 per year, and brought them within the coverage of the Civil Service Retirement Act. 60 Stat. 323, 11 U.S.C. 62 *et seq., infra,* pp. 17-19.

Under this reorganized system, contributions to the Civil Service Retirement Fund were deducted, at the rate fixed by the Retirement Act, from petitioner's $10,000 salary, beginning at that time. The total amount of his contributions during the year and a half between July 1, 1947, and the time of his retirement was $800.04 (Fdg. 11, R. 19). Petitioner would have reached the compulsory retirement age of seventy on April 9, 1951, but he elected to retire under the voluntary retirement provisions of the law on December 31, 1948 (Fdgs. 3, 7, R. 14, 16). The Civil Service Commission determined that an annuity of $8,340 per year was due him under the law (Fdg. 8, R. 18). Petitioner accordingly received monthly installments on the $8,340 annuity through May, 1950 (Fdg. 9, R. 19).

Under the Retirement Act, as it read at the time that coverage was extended to referees in bankruptcy, retirement annuities were proportional to the average yearly earnings over the five-year period during which the employee was most highly paid. See Appendix A, *infra*, pp. 16-17. In the case of referees in bankruptcy, because they were compensated on a fee basis, it sometimes fortuitously happened that their highest five years' earnings were enhanced by very large fees received from the handling of one or two unusually large estates. Upon being apprised that some of the referees' annuities, computed on the basis of these earnings, had proven to be entirely disproportionate to annuities of other employees and to

the contributions deducted in the short period during which referees had been required to contribute to the Retirement Fund, Congress, some ten months after petitioner's retirement, expressly amended the Retirement Act to provide that annuities should be computed without reference to fees in excess of $10,000 a year. Act of October 5, 1949, c. 602, 63 Stat. 704, 5 U.S.C. (Supp. V) 698 (Appendix C, *infra*, p. 19).

Since petitioner's annuity had been based on average fees of $24,989.64 (Fdg. 9, R. 18-19), the effect of the amendment was to reduce his annuity to $2,928 a year (Fdg. 10, R. 19). The amendment by its terms was retroactive to April 1, 1948, but the Civil Service Commission exercised its administrative discretion to apply it prospectively only, abandoning claim to a refund of the excess benefits paid between petitioner's retirement and the Commission's decision (Fdg. 14, 15, R. 20-22). Petitioner, asserting that the amendment as applied to him was unconstitutional, brought this action (R. 1-11), seeking to recover the difference between the amount of the old and that of the new annuity.

The court below unanimously denied recovery (R. 24-32). Three members of the Court did so (R. 24-30) on the ground that the 1946 Act bringing referees within the coverage of the Retirement Law did not permit referees' retirement annuities to be computed on the basis of past earnings in excess of the $10,000 maximum which it placed on

their salaries at the time it was passed. They held that the original annuity of $8,340 was erroneously awarded by the Civil Service Commission, that the 1949 amendment here attacked by petitioner was merely declaratory of the law as it existed at the time of his retirement, and that no constitutional question was presented. Two judges concurred in the result (R. 30-32), disagreeing with the view that the 1946 Bankruptcy Act amendments limited the referees' retirement benefits, but holding that, in any event, the 1949 amendment of the Retirement Act was clearly constitutional.

ARGUMENT

Other considerations aside, we think that this unique case does not warrant review by this Court because its decision is of significance only to three persons, among whom petitioner alone has challenged the Civil Service Commission's action upheld by the court below. Moreover, the judgment below, which accords with long settled principles, is clearly correct. There is no conflict.

1. The 1949 amendment to the Retirement Act expressly imposes the result implicit in the 1946 statute as construed by the majority below. See Appendices B and C, *infra,* pp. 17-19. Petitioner asserts that the 1949 amendment may not validly be applied to employees who retired before its enactment; but he concedes (Pet. 9-10), as he must, that it is valid as to all who did not retire until after its passage. *Pennie* v. *Reis,* 132 U. S.

464; accord, *Crenshaw* v. *United States,* 134 U. S. 99; *United States* v. *Fisher,* 109 U. S. 143; *Salt Co.* v. *East Saginaw,* 13 Wall. 373; *Butler* v. *Pennsylvania,* 10 How. 402. Therefore, the decision has significance only for those referees in bankruptcy who retired after the enactment of the 1946 legislation and before the passage of the 1949 Act. Since the 1949 Act was the result of very prompt action by Congress upon learning that the 1946 legislation, as construed by the Civil Service Commission, was leading to grossly disproportionate and inequitable results,[1] the 1949 legislation went into effect at a time when only three referees had retired (Fdg. 12, R. 19-20). See H. Rept. No. 1069, 81st Cong., 1st Sess., p. 2; S. Rept. No. 926, 81st Cong., 1st Sess., p. 2.[2]

Petitioner suggests (Pet. 17-18) that the decision below may affect the validity of future attempts by Congress to reduce benefits of other employees under the Retirement Act. But the suggestion is both unsound and unpersuasive. In the first place, the opinion below treated the 1949 Act

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[1] See *infra,* pp. 9, 11, n. 4.

[2] The reports also refer to 20 other referees then still in service, but, as indicated, *supra,* pp. 5-6, the validity of the law as applied to these persons is not in question. The 1946 Act applies only to referees in bankruptcy. The 1949 Act applies to all employees compensated on a fee basis. Besides referees, there are a few such employees, including census takers and certain postal employees. None of these persons appear to be affected because it is unlikely that the compensation received by any of them has ever exceeded $10,000 a year.

as being merely declaratory of the 1946 Act and not in derogation of it. Thus, no question of legislative reduction of the annuities of employees generally is involved. Next, the probability of such attempts is slight, as is evidenced by the fact that Congress has never reduced benefits in the past, even in the Economy Act of 1933 (48 Stat. 8, 15) when it reduced employees' salaries. Finally, in the unlikely event that Congress should desire to reduce these benefits, it might seek to achieve the desired result, forestalling or circumventing any judicial challenge on constitutional grounds, merely by phrasing the law in terms of a divestiture of the courts' jurisdiction to hear suits for the withdrawn benefits. Cf. *Bruner* v. *United States,* 343 U. S. 112. It has been held that such a course would be constitutional. *Lynch* v. *United States,* 292 U. S. 571, 581-2.

2. In the view taken by the majority below, the 1946 amendments to the Bankruptcy Act, when read as a whole, imposed on the base for retirement benefits the same $10,000 maximum Congress specifically imposed with respect to referees after the 1949 amendment to the Retirement Act. In this view, petitioner was never entitled to the $8340 annuity first awarded by the Civil Service Commission. Such a reading measures benefits by the same standard as that on which contributions to the Retirement Fund are exacted, *i.e.,* the employee's salary.

The court adopted this view because the con-

struction urged by petitioner here, which had been adopted by the Civil Service Commission, was leading to curious results.[3] Thus petitioner had been awarded an annuity of $8340 a year for life, on the basis of total contributions of $800.04, although on an actuarial basis the latter sum would have purchased an annuity of only $89.46 a year. Similarly, another referee would have received a life annuity of $17,500 a year on the basis of total contributions of $7.43. See H. Rept. No. 1069, 81st Cong., 1st Sess., p. 2. As the court says, "The outstanding fact in this case is the absurdity of the result for which plaintiff argues" (R. 29).

Accordingly, the court below applied the often stated rule: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to * * * an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *United States* v. *Kirby*, 7 Wall. 482, 486-7; see also *Church of the Holy Trinity* v.

[3] The Government did not urge this construction in the court below. It did, however, suggest (Br. 169) that "it is reasonable to assume that Congress overlooked the fact that under the Retirement Law as it then stood, the annuities of these employees would be calculated in a way that was not limited by the ceiling it imposed on their compensation." Congress was probably aware that past fees had in some cases exceeded $10,000, but there is nothing in the legislative history to indicate that Congress considered this fact with specific reference to its effect on the provision relating to retirement coverage. 60 Stat. 323, 328, 11 U.S.C. 68, Appendix B, *infra*, pp. 17-19.

United States, 143 U.S. 457, 459-462, 472; *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543.

3. Even assuming, for the purposes of argument, that the view of the 1946 statute taken by the majority below was erroneous, petitioner is nevertheless barred by the 1949 amendment to the Retirement Act. He contends that the Retirement Act gives rise to a contract between the United States and the employee, and that the 1949 amendment modifying it therefore constitutes a denial of due process. This contention is without merit.

Under settled principles the Retirement Act is not contractual. The minority below who found it necessary to reach that question so held. Rather, it is a declaration of policy, subject to the legislature's power to modify and amend it as circumstances or its views of the public welfare demand. Statutes fixing the terms, tenure, and compensation of public employees may be amended at will, because to hold such statutes contractual would be to restrict the power of Congress to modify them as changing conditions require. *Crenshaw* v. *United States,* 134 U. S. 99; *United States* v. *Fisher,* 109 U. S. 143; *Butler* v. *Pennsylvania,* 10 How. 402. With specific reference to state retirement benefits, this Court has held in *Dodge* v. *Board of Education,* 302 U. S. 74, 79, that:

> The presumption is that such a law is not intended to create private contractual or

> vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.

The Retirement Act contains nothing to rebut this presumption.[4]

a. Neither the language nor the legislative history of the Retirement Act gives any indication of an intention on the part of Congress to make promises to employees, or to hold out the benefits of the Act as inducements. The statute lacks the aspect of mutual assent necessary to any contract. Participation in the retirement system is involuntary on the part of the employees, contributions are compulsory, and no one may withdraw from the system except by giving up his federal employment.

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[4] The present statute provides an apt illustration of the reason for this presumption. The 81st Congress enacted the 1949 amendment because it became apparent that the Retirement Act, as applied to referees, was giving rise to enormous discrepancies between contributions and annuities and that referees' annuities were greatly disproportionate to those of other employees. The 81st Congress thought that earlier Congresses had inadvertently overlooked these facts. It referred primarily to the case of the referee who contributed $7.43 and to petitioner who received an $8,340 annuity on the basis of contributions of $800.04. See S. Rept. 926, 81st Cong., 1st Sess., p. 2; H. Rept. No. 1069, 81st Cong., 1st Sess., p. 2. To deny validity to the amendment on the ground that the original Act is contractual would be to hold that a vested right may be created by a mistake.

The statutory plan also lacks consideration. The retirement benefits are clearly not compensation for services, because—at least in the case of referees in bankruptcy—the beneficiaries accepted terms of employment long before the benefits of the retirement system were extended to them. Moreover, the original Retirement Act (Act of May 22, 1920, c. 195, 41 Stat. 614) looked primarily, not to the compensation of federal employees, but to the establishment of a system for removing from office superannuated but needy employees who continued to draw salaries without doing effective work, and who were in effect pensioners at full salary. See S. Rept. No. 99, 66th Cong., 1st Sess., p. 2; H. Rept. No. 120, 66th Cong., 1st Sess., p. 1.[5]

Petitioner insists (Pet. 13) that the contributory aspect of the system makes it contractual. However, the system is mainly subsidized; only a small part of the cost of the retirement benefits is met by the employees' contributions.[6] In any event, it is settled that systems such

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[5] Petitioner's contention (Pet. 13) that retirement benefits are compensation for services is further negated by his concession that the benefits may be withdrawn at any time up to the moment of retirement. Since it would be absurd to regard the entire benefits as having been earned at the last instant of employment, it follows that the benefits are not treated as compensation at all.

[6] The Civil Service Commission estimates that the average retired employee, through his contributions, has paid for 15% of the cost of his annuity. See *Civil Service Commission Retirement Report, 1951*, p. iv.

as the present, involving compulsory contribution, do not give rise to contractual rights. *Pennie* v. *Reis,* 132 U.S. 464; *MacFarland* v. *Bieber,* 32 App. D.C. 513. The contributory nature of the system gives rise to no rights beyond the right to recover the amount of the contributions, which is not in issue here. Likewise, it is clear, despite petitioner's intimation to the contrary (Pet. 13), that mere compliance with the conditions set by the statute does not make the statute a contract. E.g., *Wisconsin & M. Ry.* v. *Powers,* 191 U.S. 379.[7]

b. There is no conflict. *Dodge* v. *Board of Education,* 302 U.S. 74, which upheld a state statute reducing benefits under a retirement system substantially identical with that involved here, accords both in principle and in result with our position, as does *Phelps* v. *Board of Education,* 300 U.S. 319. *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95, which also accords in principle, created an exception because the statute there in-

[7] "The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme * * *. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law." *Wisconsin & M. Ry.* v. *Powers,* 191 U. S. 379, 387.

volved expressly referred to and incorporated by reference written contracts between the municipality and the employee. No such written contracts are involved here.[8] *Dismuke* v. *United States,* 297 U.S. 167, is not in point. It held only that an action for retirement benefits under the Act was an action based on a "law of Congress" within the meaning of the Tucker Act. Such an action, it held, was not excluded from the jurisdiction of the district courts by the Tucker Act's exception of actions for pensions, because the meaning of "pensions" in the Tucker Act was limited to veterans' pensions. It did not rest jurisdiction on the ground that the action was an action on a contract.[9]

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[8] The statute (5 U.S.C. 717) provides for the issuance of certificates to employees who have retired (see Fdg. 8, R. 17), but these certificates are not contracts; the employee does not assent to their terms. They are merely statements of the result of an administrative determination.

[9] Even if the Retirement Act were to be regarded as a contract, we think that Congress would have the power to make reasonable modifications of it, in the exercise of a legitimate legislative power. Cf. *Horowitz* v. *United States,* 267 U. S. 458; *Lichter* v. *United States,* 334 U. S. 742. Here it has done no more than this.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be dened.

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NOVEMBER, 1952.

APPENDIX A

The pertinent provisions of the Civil Service Retirement Act, 41 Stat. 614, 46 Stat. 468, as amended to the time of petitioner's retirement (Act of February 28, 1948, 62 Stat. 48, 49, 5 U.S.C. (Supp. II) 698), read as follows:

> SEC. 4. (a) The annuity of an officer or employee retired under this Act shall be a life annuity, terminable upon the death of the annuitant and shall be an amount equal to the following: (1) 1½ per centum of the average annual basic salary, pay, or compensation received by the officer or employee during any five consecutive years of allowable service at the option of the officer or employee multiplied by the years of service, or (2) 1 per centum of the average annual basic salary, pay, or compensation received by the officer or employee during any five consecutive years of allowable service at the option of the officer or employee multiplied by the years of service, plus a sum equal to $25 for each year of such service: *Provided,* That in no case shall the annuity exceed an amount equal to 80 per centum of the highest average annual basic salary, pay, or compensation received by the officer or employee during five consecutive years of allowable service.

APPENDIX B

The pertinent provisions of the Act of June 28, 1946, 60 Stat. 323, 326-328, 11 U.S.C. 68, amended Section 40 of the Bankruptcy Act to read as follows:

> SEC. 40. * * * a. Referees shall receive as full compensation for their services salaries to be fixed by the conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, at rates not more than $10,000 per annum for full-time referees, and not more than $5,000 per annum for part-time referees. In fixing the amount of salary to be paid to a referee, consideration shall be given to the average number and the types of, and the average amount of gross assets realized from, cases closed and pending in the territory which the referee is to serve, during the last preceding period of ten years, and to such other factors as may be material. Disbursement of such salaries shall be made monthly by or pursuant to the order of the Director.
>
> b. The conference, in the light of the recommendations of the councils, made after advising with the district judges of their respective circuits, and of the Director, may increase or decrease any salary, within the

limits prescribed in subdivision a of this section, if there has been a material increase or decrease in the volume of business or other change in the factors which may be considered material in fixing salaries: *Provided, however,* That during the tenure of any full-time referee his salary shall not be reduced below that at which he was originally appointed under this amendatory Act, and during any term of any such referee his salary shall not be reduced below the salary fixed for him at the beginning of that term: *And provided further,* That no salary fixed under the provisions of this section for a full time referee shall be changed more often than once in any two years or in an amount of less than $250.

* * * *

d. (1) *All referees in bankruptcy and employees in the offices of such referees shall be deemed to be officers and employees in the judicial branch of the United States Government within the* meaning of section 3 of the Civil Service Retirement Act of May 29, 1930, as amended. [Italics supplied.]

(2) Any referee who has retired or been retired under the provisions of paragraph (1) of this subdivision may, if called upon by a judge of a court of bankruptcy, perform, without compensation, such duties of a referee, conciliation commissioner or special master

under this Act, within the jurisdiction of such court, as such referee may be able and willing to undertake: *Provided, however,* That when so acting, compensation for his services shall be allowed and paid or deposited and his expenses shall be allowed and paid, as in the case of an active referee.

APPENDIX C

The Act of October 5, 1949, c. 602, 63 Stat. 704, amending the Retirement Act (5 U.S.C. (Supp. V) 698), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4(c) of the Civil Service Retirement Act of May 29, 1930, as amended, is amended by substituting a colon for the period at the end thereof and adding the following: "*Provided* That in cases of officers and employees paid on a fee basis, the maximum 'basic salary, pay, or compensation' which may be used for the purposes of this Act shall be $10,000 per annum."

SEC. 2. This amendment shall become effective April 1, 1948.

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